

Federal Communications Commission
Washington, D.C. 20554

OCT 19 1995

In reply refer to:
1800B3-DEB

Mr. Galen O. Gilbert
KTXJ Radio, Inc.
P.O. Box 2008
Jasper, Texas 75951

In re KWYX (FM), Jasper, Texas
KTXJ, Inc.
BPH-900801IB¹

Dear Mr. Gilbert:

This letter is in reference to the above captioned application to upgrade to Class C2 on Channel 274, as permitted by MM Docket 88-256.

Background.

By letter dated November 30, 1990, the staff advised you that your application was in violation of the contour protection requirements of 47 CFR § 73.215 with respect to the vacant allotment on Channel 273C2 at Beaumont, TX. Specifically, while contour protection was provided to the three pending applications for that allotment, your application did not provide contour protection to the Beaumont allotment's reference coordinates, as required by Carolina Broadcasting Co., 18 FCC 2d 482 (1969). The staff's letter required KWYX to amend its application to afford the Beaumont allotment reference coordinates contour protection pursuant to § 73.215.

The Waiver Request.

On January 14, 1991 the application was amended to request waiver of § 73.215 with respect to the Beaumont allotment reference coordinates. First of all, the waiver request contended that any Beaumont applicant would be unable to use the allotment reference coordinate site. According to the applicant, FAA considerations will prevent any applicant

¹ This application was originally filed as a modification of construction permit BPH-890616IA, as extended by permit BPH-910326JO. However, these construction permits were cancelled by letter dated March 17, 1994. Consequently, the file number prefix for the present application has been changed from BMPH- to BPH-.

from locating a tower in that area. KWYX cites the comparative proceedings in which the Beaumont applicants are involved (MM Docket 88-358) as evidence, noting the Beaumont applicants have had major difficulties obtaining clearance from the FAA for any proposed tower site, and posits that the allotment reference site would fare no differently.

Secondly, the amended application suggests that waiver of the rule is necessary for KWYX to comply with 47 CFR § 73.315. It is said that a directional antenna could not be used to provide the necessary contour protection to the allotment reference site since KWYX's community of license (Jasper, TX) and Beaumont lie in the same general direction (south). Because of intervening terrain between the proposed transmitter site and Jasper, TX, any reduction in antenna height made to compensate for the changed ERP needed to avoid prohibited contour overlap would reduce the signal strength available to Jasper, Texas.²

Consequently, KWYX believes that waiver of the contour protection requirements of § 73.215 is warranted.

Discussion.

It is not uncommon for applicants to propose sites other than the allotment reference site coordinates, as did the Beaumont applicants. Moreover, in many (if not most) cases, the allotment reference coordinate sites are not available for applicants to construct a new broadcast station. However, were other stations to fail to protect these coordinates, the useful area available to the applicants for the vacant allotment could be materially diminished. This could be a critical factor, particularly for those allotments where tower sites are already scarce, as in the case in the Beaumont proceeding (there, the scarcity is caused by FAA concerns). Moreover, in the event that all the window applicants are dismissed or denied, protection of the allotment reference site preserves the allotment for the opening of a future filing window. Given these policy concerns, we do not agree that contour protection need not be provided to an allotment's reference coordinates.

Moreover, KWYX could easily provide the necessary contour protection required by § 73.215 from its proposed transmitter site, without reducing antenna height, by reducing its effective radiated power to 23 kW (assuming the antenna height above average terrain remains at 134 meters).³ Using the Commission's standard contour prediction method in

² Apparently, KWYX believes that it must maintain a minimum ERP of 25.1 kW in order to be authorized as a Class C2 station. This is not necessarily true. See Footnote 3 below.

³ KWYX need not specify a minimum ERP of 25.5 kW to maintain Class C2 status provided that the antenna height above average terrain (HAAT) is sufficiently large to produce a rounded reference distance to the 1 mV/m (60 dBu) contour between 40 and 52 km (see 47 CFR § 73.211). The combination of 23 kW ERP and 134 meters HAAT would produce a reference distance to the 1 mV/m contour of 43.1 km, and thus would be

47 CFR § 73.313, the prohibited contour overlap would be eliminated under § 73.215 while the predicted 70 dBu contour would still encompass all of Jasper, TX. As the original application indicated, line-of-sight coverage would be provided to all of Jasper.

Conclusion.

When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. Columbia Communications Corp. v. FCC, 832 F.2d 189, 192 (D.C. Cir. 1987); Rio Grande Family Radio Fellowship v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968) (per curiam). We have afforded KWYX's waiver request the "hard look" called for under the doctrine of WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in application BPH-900801IB are insufficient to establish that grant of the requested waiver would be in the public interest.

Accordingly, the request for waiver of 47 CFR § 73.215 IS HEREBY DENIED, and application BPH-900801IB, being unacceptable for filing, IS HEREBY DISMISSED. These actions are taken pursuant to 47 CFR § 0.283.

Sincerely,



Dennis Williams
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Fletcher, Heald & Hildreth
: Guy C. Hutcheson